No. 89-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY, *Petitioner,*

v.

T. L. JAMES & COMPANY, INC., *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

I.

There Is Conflict Among The Circuits As To The Circumstances In Which A Shareholder Is Directly Liable As An "Owner Or Operator" Under CERCLA.

James Company argues the Fifth Circuit's decision in this case is the only circuit court opinion deciding a parent corporation's liability under CERCLA as an "owner or operator" of its subsidiary's hazardous waste facility.[1] This overly cramped analysis must be rejected.

[1] James Company admits in footnote 5 at page 8 of its brief that several district courts have decided this issue.

In *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the Second Circuit found an individual shareholder, LeoGrande, directly liable as an "owner or operator" due to his ownership of stock in Shore Realty Corporation and his active participation in its management. *Shore's* reasoning equally applies to a corporate shareholder. CERCLA defines an "owner or operator" as "any person owning or operating such facility . . ." The Act defines "person" to include both individuals *and* corporations. 42 U.S.C. Sec. 9601(21).

Joslyn urged below that James Company was directly liable as an "owner or operator" under the *Shore* analysis: James Company owned a controlling interest in its subsidiary Lincoln and actively participated in managing Lincoln's facility. The Fifth Circuit expressly refused to follow *Shore* and found that a shareholder could only be liable if its corporation was a sham. See *Joslyn Manufacturing Co. v. T. L. James & Company*, 893 F.2d 80, 82 (5th Cir. 1990).

The Eighth Circuit's opinion in *NEPACCO* also conflicts with the Fifth Circuit decision. James Company properly points out at page 10 of its brief that the Eighth Circuit reversed the district court's finding that a NEPACCO shareholder and officer, Lee, was liable as an "owner or operator." However, that reversal was based on the fact NEPACCO did not own the site being cleaned up, not because the Eighth Circuit disagreed with the district court's conclusion that a person who owns an interest in a facility and actively participates in its management can be held liable as an "owner or operator."[2] (See pages 7-9 of

[2] If anything, the district court in *NEPACCO* went even further than *Shore* by suggesting that "owner or operator" liability could

(Footnote continued on following page)

Joslyn's petition.) In fact, the Eighth Circuit cited *Shore's* holding that a "shareholder-manager" can be liable under CERCLA to support, by analogy, its finding that NEPACCO's president and major shareholder, Michaels, was liable under the Resource Conservation and Recovery Act. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986).

The recent Eleventh Circuit decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), also conflicts with the Fifth Circuit position. In that case, the government brought suit against Fleet Factors Corporation ("Fleet"), the secured creditor of a company which had owned and operated a hazardous waste facility. Fleet moved for summary judgment on the grounds, *inter alia*, it was 1) not an operator of its debtor's facility and 2) it was exempt from liability as a secured creditor under 42 U.S.C. Sec. 9601(20)(A) because it had not participated in the management of the facility. The trial court denied Fleet's motion and granted its request for interlocutory appeal, finding its order "disposes of controlling questions of law concerning which there is substantial doubt, including, but not limited to, my construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition . . ." *Id.*, 1554, ftn. 2.

The Eleventh Circuit affirmed. It noted the "essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on those responsible for problems caused by the disposal of chemi-

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[2] *continued*
be imposed not only for actual participation but also if a person had the *capacity* to discover the pollution, the *power* to direct the activities of those controlling the mechanisms causing the pollution; and the *capacity* to prevent or abate damage. See 579 F.Supp. 823, 848-49.

cal poison." The court concluded the "overwhelming remedial goal" of the CERCLA statutory scheme could only be achieved by construing CERCLA's ambiguous statutory terms in favor of liability for the costs incurred by the government in responding to the hazards at toxic waste facilities. *Id.*, 1553, 1557.

To achieve this purpose, the *Fleet Factors* court interpreted "participating in the management" of the facility to mean the secured lender exemption is lost when the lender's involvement in management is "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Id.*, 1558. This interpretation of the level of participation rendering a lender liable is very close to the *NEPACCO* standard for conduct rendering a person liable as an "owner or operator." See ftn. 2, *supra*.[3]

Importantly, the Eleventh Circuit went further in suggesting it would determine whether a person was liable as an "operator" under a *Shore/NEPACCO* analysis. It cited *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I. 1989), as providing an example of the activity that could subject a creditor to direct liability as an operator. *Id.*, 1557, ftn. 10. Citing *Shore* and *NEPACCO*, the *Kayser-Roth* court held a parent corporation directly liable as an "operator" of its subsidiary's facility; it cited the district court's opinion in this case as a conflicting view.[4]

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[3] The *Fleet Factors* court viewed the standards for liability as an operator and as a participating lender to be similar but not congruent. *Id.*, 1557. It found the facts alleged supported Fleet's liability as both a participating lender and as an operator.

[4] The *Kayser-Roth* court also pierced the subsidiary's corporate veil to hold the parent liable as an "owner" under a federal common law analysis emphasizing CERCLA's purposes, as opposed to the *Jon-T* "checklist" approach. It cited *Town of Brookline*, *infra*. (Also see Joslyn's petition, pages 10-12.)

This conflict among the courts belies James Company's claim that the Fifth Circuit correctly interpreted the language and history of CERCLA, an Act which the courts have described as "hastily drafted and adopted" and "not a model of statutory clarity." *Fleet Factors*, 901 F.2d 1550, 1554, ftn. 3. Such conflict threatens CERCLA as a national plan. The Court should resolve this conflict.

II.

The Fifth Circuit's *Jon-T* "Alter Ego" Test Conflicts With Federal Common Law.

Despite James Company's protestations, the courts below did not apply a federal common law "alter ego" analysis. Instead, they rigorously applied the *Jon-T* test, a "laundry list" approach which the Fifth Circuit admitted was "essentially the same" as the veil-piercing analysis it had used in diversity cases. While it is true federal common law borrows heavily from state law in this area, it is also true that a court applying the federal common law analysis first determines whether the federal statute at issue places any importance on the corporate form. *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981). Ignoring this step, the courts below focused on *Jon-T's* technical factors and found James Company was not liable as a matter of law because Lincoln was not a sham.

But federal common law does not disregard only "sham" corporations; a corporate entity may be disregarded in the interests of "public convenience, fairness and equity." *Town of Brookline*, 667 F.2d 215, 224. That federal courts will not allow legislative policy to be defeated by the corporate form was a well-established principle of federal law when CERCLA was passed (see, *e.g.*, *Chicago Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Assn.*, 247 U.S. 490 (1918); *Anderson v. Abbott*, 321 U.S. 349

(1944)), and Congress expressly provided that federal law would apply in CERCLA contribution actions. 42 U.S.C. Sec. 9613(f)(1).

Disregarding Lincoln's separate corporate form would serve the interests of public convenience, fairness and equity. It is CERCLA's overriding purpose to shift the cost of toxic waste clean-up to responsible persons and away from innocent taxpayers. Imposing liability on James Company as a responsible party is entirely fair and equitable, given its obvious control over Lincoln: James Company organized Lincoln; it controlled 100% of Lincoln's stock; it provided all of Lincoln's financing; it approved the hiring and firing of Lincoln's executive officers; it monitored Lincoln's collections and disbursements on a daily basis; it received daily reports on Lincoln's plant operations; and it received all of the dividend payments Lincoln ever made.

Moreover, establishing a uniform federal rule as to the circumstances in which a shareholder is liable as an "owner or operator" is appropriate under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). CERCLA was intended to be a national solution to a national problem. CERCLA liability should not turn on the location of the waste site or the "alter ego" analysis of the state of incorporation selected, fortuitously or intentionally, by the persons which released hazardous waste into the environment. Nor would a uniform federal rule unduly harm commercial relationships predicated on state law. Shareholders are entitled to rely on the law of the state of incorporation solely with regard to the corporation's internal affairs and not when the rights of third parties, especially the rights of the public, are involved. *First National City Bank v. Banco Para El Comercio Exteror De Cuba*, 462 U.S. 611, 621 (1983).

Interestingly, the State of Louisiana apparently did not share James Company's concern that a national standard for CERCLA liability would be inconsistent with our federal system. Louisiana has adopted its own Environmental Quality Act modeled, at least in part, on CERCLA (and other states have also). It argued in its *amicus* brief to the Fifth Circuit that James Company should be held liable for clean-up costs at the Lincoln site.

CONCLUSION

Joslyn respectfully requests this Court to grant its petition for writ of *certiorari*.

Respectfully submitted,

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